

**Supreme Court, U.S.
FILED**

05 - 77 3 OCT 18 2005

**OFFICE OF THE CLERK
CASE NO.**

IN THE UNITED STATES SUPREME COURT

**FRANKLIN D. WILMOTH, AND
MARY WILMOTH,
Petitioners**

vs.

**PORTAGE COUNTY, OHIO; BRIMFIELD POLICE
DEPARTMENT; PORTAGE COUNTY BOARD OF
MENTAL HEALTH AND RETARDATION; DAVID
WALTERS; JOHN RICHARDS; BOBBURGESS;
DESKO, PATROLMAN, BRIMFIELD POLICE
DEPARTMENT; PATTY UYSK, SLC; BRIMFIELD
TOWNSHIP; JUDY FETTEROFF; MING LAI,
Respondents**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

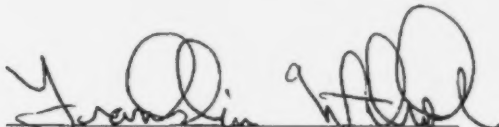
**FRANKLIN WILMOTH
—MARY WILMOTH
1774 OLD FORGE ROAD
MOGADORE, OHIO 44260
330-673-5456**

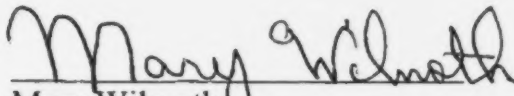
QUESTION PRESENTED FOR REVIEW:

THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH ITS SISTER COURTS, AND THIS COURT WHEN IT FAILED TO CONSIDER THE PANOPLY OF ISSUES RELATED TO WHEN THE FEDERAL ACCRUAL DATE STARTS IN A 42 U.S.C. SECTION 1983 ACTION, AND THE EXCEPTIONS TO THAT ACCRUAL DATE, CONFLICTS WITH DONAHUE V. GAVIN, 280 F. 3D 371, 384 (3RD CIR 2002); WASHINGTON V. SUMMERVILLE, 127 F. 3D 552, 558-59 (7TH CIR. 1977), AND LEAVES OPEN THE ISSUE OF DOES A NOLLE PROSEQUI IN AND OF ITSELF START THE FEDERAL ACCRUAL DATE AFTER A STATE CONVICTION IS REVERSED REGARDLESS OF GUILT OR INNOCENCE.

CORPORATE DISCLSURE:

WE ARE NOT ASSOCIATED WITH ANY CORPORATION, OR PUBLIC HELD STOCK ENTITY, NOR ARE THE RESPONDENTS, TO MY KNOWLEDGE, THAT WOULD COME INTO QUESTION IN THIS CASE. I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, which was executed on this 15 th day of December, 2005.


Franklin Wilmoth


Mary Wilmoth

JURISDICTION OF THIS COURT:

This Court has jurisdiction to hear this case, in that it involves 42 U.S.C. Section 1983, a Federal Statute, and the United States Court of Appeals for the Sixth Circuit made a decision, on July 29, 2005, that conflicts with other sister Courts of Appeals of the United States. This case involves an important constitutional question of when the accrual date begins to run, in a 42 U.S.C. Section 1983 action, and whether innocence or guilt has a ramification on when that date begins or whether just the entry of a nolle prosequi, in and of itself, is enough to start the accrual date.

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I. ISSUES OF THE QUESTION PRESENTED:

1. Whether the federal accrual date begins, for a 42 U.S.C. Section 1983 Action, when a *nolle prosequi* is entered after reversal, or whether Ohio law, which requires a finding by the trial court that the person was wrongfully incarcerated in Ohio, starts that accrual date.
2. Whether the exceptions found in DONAHUE V. GAVIN, 280 F. 3D 371, 384 (3RD CIR 2002); WASHINGTON V. SUMMERVILLE, 127 F. 3D 552, 558-59 (7TH CIR. 1977), demonstrate that some finding of innocence is required and the *nolle prosequi* standing alone is insufficient to start the federal accrual date.

II. STATEMENT OF THE CASE AND STATEMENT OF FACTS:

In this case the Petitioner Wilmoth, (hereinafter when referred to singularly will be referred to as Petitioner) was charged with multiple counts of offensive sexual behavior, and after a trial to the court, absent a jury, the Plaintiff was convicted of Gross Sexual Imposition, on April 13, 1994, prior to an appellate court reversal.

The Court of Appeals, Eleventh District, Case No. 94 PA 0036, on June 12, 1995, reversed the conviction based upon the fact that the Court, due to trial counsel's

error in discovery, resulted in not permitting Petitioner's Physician that would have testified, would have testified that the Petitioner was physically incapable of the charges. The prosecutor decided not to retry the case, after Petitioner filed for dismissal of the still pending charges in 2001, and entered a prosecutor written *nolle prosequi*, which stated that the witnesses no longer wanted to testify."

The Court of Common Pleas entered a Judgment entry, after the Petitioner sought relief, which stated: "This matter came on for hearing on Defendant's Petition for Determination of Wrongful Imprisonment. The Court hereby finds that the Defendant was wrongfully imprisoned from March 14, 1994 through August 5, 1995."

The Petitioner was awarded \$111,934.20, pursuant to the wrongful imprisonment statute of Ohio Revised Code, Section 2743.48.

The Petitioner then sought relief in the Federal District Court, Case No. 5:03CV 2462, which was ultimately dismissed on the grounds that the statute of limitations began to run on the day that the prosecutor entered the *nolle prosequi*. The Petitioner timely appealed.

A panel of this Court issued an Order on April 28, 2005, affirming the District Court, without oral hearing, pursuant to Federal Appellate Rules of Procedure, Rule 34(a). The Petitioners sought a rehearing en banc, which was denied on July 29, 2005.

III QUESTION PRESENT ON REVIEW:

THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH IT SISTER COURTS, AND THIS COURT WHEN IT FAILED TO CONSIDER THE PANOPLY OF ISSUES RELATED TO WHEN THE FEDERAL ACCRUAL DATE STARTS IN A 42 U.S.C. SECTION 1983 ACTION, AND THE EXCEPTIONS TO THAT ACCRUAL DATE, CONFLICTS WITH DONAHUE V. GAVIN, 280 F. 3D 371, 384 (3RD CIR 2002); WASHINGTON V. SUMMERVILLE, 127 F. 3D 552, 558-59 (7TH CIR. 1977), AND LEAVES OPEN THE ISSUE OF DOES A NOLLE PROSEQUI IN AND OF ITSELF START THE FEDERAL ACCRUAL DATE AFTER A STATE CONVICTION IS REVERSED REGARDLESS OF GUILT OR INNOCENCE.

1. Whether the federal accrual date begins, for a 42 U.S.C. Section 1983 Action, when a nolle prosequi is entered after reversal, or whether Ohio law, which requires a finding by the trial court that the person was wrongfully incarcerated in Ohio, starts that accrual date.